IN THE

Supreme Court of the United States

October Term, 1943

No. 559

HANS PETE MORTENSEN and LORRAINE MORTENSEN,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF ON BEHALF OF APPELLANTS

EUGENE D. O'SULLIVAN,
Of Omaha, Nebraska,

THOMAS W. LANIGAN,
Of Grand Island, Nebraska,

WILLIAM P. MULLIN,
Of Grand Island, Nebraska,
Counsel for Appellants.

Law Briefs—OMAHA LINO-SLUG CO.—418 So. 15th St.

INDEX

SUBJECT INDEX

LIST OF CASES CITED

INDEX—Continued

PROVISIONS OF U. S. CONSTITUTION CITED

STATUTES CITED

RULES CITED

IN THE

Supreme Court of the United States

October Term, 1943

No. 559

HANS PETE MORTENSEN and LORRAINE MORTENSEN,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF ON BEHALF OF APPELLANTS

OPINION BELOW

The opinion of the Court below which the appellants seek to reverse was rendered by the United States Circuit Court of Appeals for the Eighth Circuit on November 23, 1943, at St. Louis, Missouri (R. 79-83), affirming, by a divided Court, the conviction of appellants in the United States District Court for the District of Nebraska, Grand Island Division, in a jury trial had before Honorable James A. Donohoe, United States District Judge. In the Circuit Court of Appeals the case was heard before Circuit Judges Woodrough, Thomas and Johnsen, and the majority opinion was delivered by Circuit Judge Johnsen and

concurred in by Circuit Judge Thomas (R. 79 to 83), and a dissenting opinion was delivered by Circuit Judge Woodrough (R. 84).

The opinions of the Circuit Court of Appeals (R. 79-83 and R. 84) have not as yet been reported. No written opinion was rendered by the Trial Court.

GROUNDS UPON WHICH JURISDICTION INVOKED

The jurisdiction of this Court is invoked:

(a) Under that part of the 5th Amendment to the United States Constitution which in so far as applicable provides "that no person shall * * * be deprived of * * * liberty * * * without due process of law."

(b) Under that part of the 6th Amendment to the United States Constitution which in so far as applicable provides "that in all criminal prosecutions the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation" made against them.

(c) Because this is a prosecution under the laws of the United States, to-wit, Sections 397 and 398 of 18 U. S. C. A., known as the Anti-White Slave Traffic Act, and involves a Judicial Construction of the scope, intent and meaning of these Statutes of the United States, and the jurisdiction over the alleged offenses is grounded upon knowingly transporting, causing to be transported, or aiding and assisting in obtaining transportation for, or in transporting a woman or girl, in interstate commerce, for the purpose of prostitution or debauchery, and the ultimate question presented and to be determined is whether or not a harmless and laudable circle vacation trip of a man and wife and two prostitutes, beginning

and ending at the same place in a State, but passing through other States enroute, is denounced by these Statutes and amounts to a violation of these Statutes, if prostitution for gain occurred in appellants' hotel between these women and men other than the defendant, both before and after the circle vacation trip was made.

(d) Because in passing upon the question presented by Subsection (c), infra, there is a direct conflict in the opinion in case of *U. S. vs. Wilson*, 266 Fed. 712, a District Court decision from the 6th Circuit, and the opinions in *Burgess vs. U. S.* (App. D. C.), 294 F. 1002; *Corbett vs. U. S.*, 299 F. 27, 9th C. C. A., and *U. S. vs. Winkler* (D. C., W. D., Tex.), 299 F. 834, and the instant case, and the later case of *Ellis vs. United States*, reported in the Federal Reporter advance sheets of January 3rd, 1944, 138 Fed. (2d) 612, decided by the U. S. Circuit Court of Appeals for the Eighth Circuit.

(e) Under the provisions of the 5th Amendment to the Constitution of the United States relating to due process of law, the failure and refusal of the Trial Court to give an instruction covering the defendants' theory of the case as shown by their evidence amounts to a denial of a constitutional right.

(f) Because the denial of a Bill of Exceptions to appellants by the Trial Judge, and the Circuit Court of Appeals is in direct conflict with the provisions of Rule 7 of the Rules promulgated by the Supreme Court of the United States relating to appeals in criminal cases from the District Court to the Circuit Court of Appeals, and is also in direct conflict with the decisions in *Boynken vs. Huff*, 121 Fed. (2d) 865, decided by the United States

Circuit Court of Appeals for the District of Columbia, and *Ray vs. U. S.*, 301 U. S. 158, 57 S. Ct. 700, 81 L. ed. 976, and *Forte vs. U. S.*, 302 U. S. 223, 58 S. Ct. 180, 82 L. ed. 209.

(g) Under Section 240(a) of the Judicial Code, as amended by the Act of February 13th, 1925, C. 229, Section 1, 43 Stat. 938, now Section 347(a), Title 28, U. S. C. A.

STATEMENT OF THE CASE

The appellants, who are husband and wife (R. 59), were indicted jointly in the District Court, as aforesaid, on an indictment returned on January 28th, 1941, containing two counts of which Count 1 (R. 1 and 2) charged that the defendants on September 4th, 1943, did unlawfully, wilfully, knowingly and feloniously transport and cause to be transported, and aid and assist in obtaining transportation for, and in transporting, in interstate commerce, from Salt Lake City, Utah, to Grand Island, Nebraska, a certain named woman, for the purpose of prostitution and debauchery and with the intent and purpose to induce, entice and compel said woman to give herself up to debauchery and to engage in immoral practices; and Count 2 (R. 2) charged them with an exactly similar offense, except that a different woman was named as the person so transported.

The appellants filed a Plea in Abatement and Motion to Quash the Indictment (R. 3 to 6, incl., and R. 9); filed a written offer to prove certain facts (R. 7 and 8). The appellee demurred to these pleadings (R. 6 and 7), which demurrer was overruled (R. 11 and 12) and the Government was given leave to and did file an answer to the plea in abatement, in which was incorporated a demurrer

(R. 10), and after hearings thereon these pleadings were overruled (R. 11), exceptions were taken thereto and allowed by the Court (R. 11).

The indictment was and now is assailed upon the grounds that same did not plead facts but pleaded conclusions, was duplicitous, inconsistent, vague, indefinite and uncertain, and was not sufficiently informative so as to satisfy the requirements of the 5th and 6th Amendments to the United States Constitution, by according them due process of law and by advising the appellants of the nature and cause of the accusations made against them, and because each count of the Indictment embraced divers ways, means and manners in which White Slavery could be committed under the law, all of said ways, means and manners being connected up by the pleader by substituting the conjunctive "and" for the disjunctive "or," used in the statute.

Although the Plea in Abatement and the Motion to Quash did not specifically urge that the Indictment was defective for the reasons referred to above (R. 3-6 and R. 9), the Motion of the Defendants to Dismiss the Action and Discharge the Jury (R. 23, paragraphs a, b, and c) did direct the attention of the Trial Court to same and these questions were definitely presented to the Circuit Court of Appeals in the Assignment of Errors (R. 35, paragraphs 11, 12, 13, 14, 15, and 16; R. 36, paragraphs 11, 12, 13, 14, 15, and 16) and the Circuit Court of Appeals entertained the question and specifically ruled adversely to appellants' contentions.

It was the contention of the appellants, as disclosed by the Plea in Abatement and Motion to Quash (R. 3-6) and the offer to prove (R. 7-8), which matters were ad-

mitted by the Demurrers of the appellee (R. 6-7), that the facts relating to interstate transportation did not bring this case within the purview of Sections 397 and 398 of 18 U. S. C. A., the Anti-White Slave Traffic Act, because the actual transportation of these two women was from a point in the State of Nebraska, to-wit, Grand Island, to the same point in the State of Nebraska, and that the transportation of the appellants and these two women through other states was for the purpose and intention of taking a circle vacation tour, or trip, and it was not the intentional transportation denounced by the law, and that the Government, in order to make a case on paper, had selected Salt Lake City, Utah, as the starting point of the transportation, which city was merely one of the cities which the parties had passed through on the circle vacation trip on their way back home.

In line with appellants' theory of the case counsel for the appellants requested, and the Trial Court refused to give, the following instruction, to which refusal an exception was taken and allowed by the Court (R. 14):

> "If you find from the evidence that the vacation trip in question commenced at Grand Island, Nebraska, and that the final destination was Grand Island, Nebraska, and the states of Colorado, Wyoming and Utah were incidentally gone through, you are instructed that the White Slave Traffic Act specifically provides that the words 'interstate commerce' as used in the Act shall include transportation from one state to another state. This definition necessarily excludes by implication transportation from one point in a state to the same point within the same state, and if you so find, then you shall bring in a verdict of not guilty as to both defendants on each count of the indictment."

Thereafter pleas of not guilty were entered (R. 11 and 12), a trial was had (R. 11 and 12), and after all of the evidence had been submitted a written Motion to Dismiss was filed (R. 23 to 25, incl.), same was overruled, and upon argument and submission, the jury returned a verdict of guilty on both counts (R. 13), and each of said parties received a sentence of 3 years imprisonment on each of the two counts of the Indictment, said sentences to run concurrently, and Hans Pete Mortensen was also sentenced to pay a fine of $500.00 on each of said two counts (R. 14 to 16).

Later a Motion for a New Trial was filed and overruled (R. 16 to 22, incl.), Notices of Appeals were filed R. 30, 31), Bail and Cost Bond were posted (R. 26 to 30, incl.).

Thereafter, pursuant to the provisions of Rule 7 of the Rules of Procedure in Criminal Cases promulgated by the Supreme Court, the Clerk notified the Trial Judge of the filing of the Notices of Appeal (R. 45), but the Trial Judge did not *at once* notify the respective attorneys to appear before him, so as to give directions to counsel with respect to making up the record on appeal (R. 45, 46), and said attorneys were never notified pursuant to the provisions of Rule 7, so to do, until 2 days after the statutory 30-day period had expired (R. 32, 33), and then the Trial Court denies the appellants the right to a Bill of Exceptions (R. 42, 43, 50, 51), but permitted an appeal to be taken on the Transcript alone, pursuant to Rule 8 of the Rules promulgated by the Supreme Court (R. 43, 44).

Thereafter application was made to the Circuit Court of Appeals for the Eighth Circuit to allow appellants a Bill of Exceptions, and both a showing (R. 53-71) and

counter showing (R. 72-76) was made, and after arguments of counsel were had the petitioners were again denied a Bill of Exceptions (R. 77).

In appellants' brief filed in the Circuit Court of Appeals the matter of the denial of a Bill of Exceptions to them was again urged as error and this matter was argued to the Court, but same was to no avail (Opinion footnote, R. 81).

A reading of this footnote to the majority opinion of the Circuit Court of Appeals (R. 41) discloses a very unusual way of handling and considering this question. The record was unofficially read, judgment was passed thereon, and no opportunity was afforded these appellants to have a review by this Court of this official finding made from an unofficial record.

It is our contention that these questions are presented to the Court for determination:

(a) Does an Indictment whose allegations are not only in the language of the Statute, but which embraces in each count thereof, by use of the conjunctive "and," divers ways, means and manners in which an offense may be committed under the Statute, some of which are inconsistent with others, satisfy the constitutional requirements under that part of Article 5 of the Amendments to the United States Constitution relating to due process of law, and that part of the 6th Amendment to the United States Constitution relating to the right of an accused to be informed of the nature and cause of the accusation made against him, and is such an indictment in each of its counts vulnerable to the claim that it pleads conclusions instead of facts and is vague, indefinite and uncertain and duplicitous?

(b) Do Sections 397 and 398, Title 18, of the United States Anti-White Slave Law, as follows—

"397. WHITE-SLAVE TRAFFIC; TERMS DEFINED. The term 'interstate commerce,' as used in this section and sections 398 to 404 of this title, shall include transportation *from* any State or Territory or the District of Columbia *to* any other State or Territory or the District of Columbia."

"398. TRANSPORTATION OF WOMAN OR GIRL FOR IMMORAL PURPOSES. * * * Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate commerce, * * *, any woman or girl for the purpose of prostitution or debauchery, * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the Court."

define and denounce as an offense against the United States a state of facts where persons take prostitutes employed in their hotel on a circle vacation trip and incidentally on said trip going and coming home pass through several states, and can the Government ignore the real beginning of the transportation and of its own accord select a starting point of their own choosing, which was the place where the parties started back on their homeward journey?

(c) Can the real intent to take these prostitutes on a vacation trip be ignored and another intent be conjured up by the law enforcing authorities, because of the fact that prostitution occurred both before and after the circle vacation trip was taken?

(d) Is it proper for a Trial Judge in a District Court of the United States to refuse to give, upon the

request of the defendants, an instruction to the trial jury covering their theory of the case?

(e) Can defendants, who seek to appeal from their conviction in the District Court of the United States, be deprived of a Bill of Exceptions on said appeal because of the failure of the Trial Judge to comply with the mandatory provisions of Rule 7 of the Rules promulgated by the Supreme Court of the United States for such appeals in criminal cases, from the District Court of the United States to the Circuit Court of Appeals of the United States, which rule is as follows:

> " 'The Clerk of the trial Court shall *immediately* notify the trial judge of the filing of the Notice of Appeal, and *thereupon* the trial judge *shall at once* direct the appellant or his attorney and the United States Attorney, to appear before him *and shall give such directions* as may be appropriate with respect to the preparation of the record on appeal, including direction for the purpose of making promptly available all necessary transcripts of testimony and proceedings.' "

(f) Is it an abuse of discretion on the part of a Trial Judge of the United States District Court and of the Circuit Court of Appeals to deny appellants a Bill of Exceptions when the failure to procure one was due to the fact that the Trial Judge, although setting the place for the meeting of counsel for the purpose of giving directions relating to the making up of a Bill of Exceptions, did not "at once" set the date of said meeting, but delayed setting the date until 2 days after the statutory 30-day period had expired?

(g) Under Rule 4 of the Rules Promulgated by the Supreme Court of the United States in reference to

criminal appeals from the District Court to the Circuit Court of Appeals, it is provided:

> "'From the time of the filing with its Clerk of the Duplicate notice of appeal, the Appellate Court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal.'"

Was it not the duty of the Circuit Court of Appeals under that portion of Rule 4 to permit a Bill of Exceptions in a case such as the instant case?

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in not holding that the Indictment was a nullity, in that it is pleaded conclusions instead of facts, was duplicitous, inconsistent, vague, indefinite and uncertain and therefore violative of the 5th and 6th Amendments to the United States Constitution, in that it did not sufficiently advise the petitioners of the nature and the cause of the accusation made against them.

2. The Circuit Court of Appeals, in the majority opinion, erred in not holding that the facts in the instant case did not fall within the purview of The United States White Slave Law, 18 U. S. C. A., Sections 397 and 398, because the transportation which actually took place was not transportation in interstate commerce within the intent or meaning of the law—that is, transportation from a point in one state to a point in another state, but was a transportation from Grand Island, Nebraska, to Grand Island, Nebraska, and the touring through other states on the circle vacation trip was a mere incident to the through transportation and not transportation from one

state to another—the transportation denounced by the law.

3. The Circuit Court of Appeals, in the majority opinion, erred in ignoring the real starting point of the transportation and permitting the Government to select in its place and stead an intermediate city through which the parties incidentally happened to pass while enroute on a circle vacation trip.

4. The Circuit Court of Appeals, in the majority opinion, erred in not holding that if the petitioners at the time, and prior to leaving Grand Island, Nebraska, had no intent to transport said two women in interstate commerce for immoral purposes, but left on a vacation tour, then petitioners did not violate Sections 397 and 398 of Title 18, U. S. C. A., regardless of what immoral acts said women may have committed upon their return to Grand Island, Nebraska.

5. The Court erred in refusing to give the aforesaid instruction requested by the petitioners because same, aside from stating the law correctly, covered their theory of the case.

6. The Circuit Court of Appeals erred in refusing to permit petitioners to have a Bill of Exceptions.

ARGUMENT

Point I.

We contend that this Indictment in each of its two counts is duplicitous, inconsistent and a nullity. It charges four different offenses in each count, to-wit, that the defendants *did transport, did cause to be transported, did aid and assist in obtaining transportation* and *in transporting* in interstate commerce the women in question. These ways or means are improperly placed in one count, together with the language, "with the intent and purpose to *induce, entire* and *compel*, etc.

That by reason of said duplicity each of said counts contain matters which are inconsistent with other portions of the same count, and also said Indictment expressly violates the provision of Sec. 557, Title 18, U. S. C. A., which will be quoted later.

The law upon which this prosecution is grounded does not use the conjunctive AND but the disjunctive OR in reciting these separate, distinct and inconsistent ways or means of committing the offenses, but the pleader does not use the disjunctive OR, but instead uses the conjunctive AND. To draft the Indictment in the way and manner in which it is drawn and put the defendants on trial on same is contrary to the laws of the United States and to certain provisions of the Constitution of the United States and Amendments thereto, particularly United States Constitutional Amendments 5 and 6, and that portion of Section 8 of Article I of the said Constitution, which exclusively empowers the Congress of the United States to make all laws necessary and proper to carry into execution all of the Powers of Government, and to create and define criminal offenses and to provide punishment therefor. By alleging disjunctives in the law as con-

junctives in the Indictment it amounts to an Amendment of the law by the United States Attorney and violates the right of the defendant to have the charge against him made in the language of the statute or in words of similar import, and denies him the right to have each charge made separately, and not all charges under the law made against him en masse. To make said charges in the way and manner stated in the two counts of the Indictment amounts to a denial of due process of law as guaranteed to the defendant under the 5th Amendment to the United States Constitution and to a denial of defendants' rights under the 6th Amendment to the Constitution of the United States which requires a defendant to be informed of the nature and cause of the accusation against him, without evasion and with precision and certainty.

It is not stated specifically in any of the two counts of the Indictment whether the charge was based on the theory that the defendants *did transport, did cause to be transported, did assist in obtaining transportation for, or in transporting* or whether the intent and purpose was to *induce, entice* or *compel* the women to be transported in interstate commerce, all of which means different things.

The intent and purpose are necessary and essential elements of the offenses created by Section 398 of Title 18, U. S. C. A., upon which this Indictment is predicated. There is no sufficient or proper allegation in the Indictment alleging any intent or specific intent but merely a blanket charge of a general and unspecified intent which might be one of the three but probably not all of the intents alleged, and this also amounts to a violation of the defendants' right to be accorded due process of law as guaranteed by the 5th Amendment to the United States

Constitution and is also violative of that portion of the 6th Amendment to the United States Constitution which in so far as applicable provides that the accused shall have the right to be informed of the nature and cause of the accusation made against him.

This Indictment in its two counts, and each of said counts, fails to allege the offenses attempted to be pleaded in the language of the statute or in language of similar import as that contained in the portion of the law creating and defining the said offense, to-wit, Section 398 of Title 18, U. S. C. A., because the pleader uses AND for OR without any legislative authority.

The Indictment in its two counts fails to plead sufficient facts so as to bring the matters alleged within the law and to inform this defendant with sufficient particularity and certainty as to the precise charge attempted to be made against him and fails to disclose to the defendant the necessary and proper facts relative to the claimed commission of the alleged offenses charged in each of said counts and contains mere conclusions and does not plead facts, and also the allegations are vague, indefinite and uncertain and do not state sufficient facts or circumstances tending to identify the particular manner in which the offense was committed.

At the outset it might be urged that because of the failure on the part of the appellants to challenge precisely the sufficiency of the indictment in the preliminary pleadings, to-wit, the Plea in Abatement and the Motion to Quash (R. 3-6, 9), and called the attention of the Court to same for the first time in paragraphs a, b, and c of the Motion of the Defendants to Dismiss the Action and Discharge the Jury (R. 23), that appellants have waived

their rights to now urge that the Indictment pleaded conclusions, was duplicitous, inconsistent, vague, indefinite and uncertain, and was not sufficiently informative so as to satisfy the requirements of the 5th and 6th Amendments to the United States Constitution.

Ordinarily that argument might be sound in a case where there are minor defects in an Indictment, but in the instant case we have an Indictment (R. 1-2) which is so inconsistent that it is in fact a nullity in the light of the 5th and 6th Amendments and the Court could never acquire jurisdiction to try this case. Again these Constitutional rights cannot be considered as waived and may be asserted at any time even after final conviction, sentence and imprisonment.

This Indictment could not be proved in toto and amounts to a charge in the alternative. The appellants either transported, or caused to be transported, or aided and assisted in obtaining transportation and in transporting. They were in one of the three categories.

It is elementary that one may not plead in the alternative. No cases need be cited to support that statement. If the disjunctive "or" used in the statute connected up these allegations, of course everyone could readily see that the pleading was in the alternative. Is the pleading any the less in the alternative if the conjunctive "and" is used to connect up inconsistent allegations? Does that way of pleading satisfy the provisions of the 5th and 6th Constitutional Amendments or is it null and void? Does the law contemplate that the Prosecuting Officer can amend the Congressional Act by substituting "and" for "or"? Is he bound to plead the statute as he finds it? If he can legally change "or" into "and"

why can't he change the rest of the context of the statute? Just because simple words—words of opposite meaning—are substituted does not make the doing thereof legal.

When a pleading like this is countenanced what happens? The Prosecutor changes the Congressional Act by substituting "and" for "or." The Trial Judge in instructing the Jury instead of requiring the Government to prove the charge as made in the Indictment has to change "and" back to "or," because if he did not do so the Jury, if they did their sworn duty, would be obliged to acquit the defendant. The jury must pick out any one of the three inconsistent ways referred to—they could not under the evidence find that all were proved beyond a reasonable doubt.

In *U. S. vs. Hunt* (C. C. A., Ill., 1941), 120 F. (2d) 592, it is stated:

> "An indictment charging two defendants in six counts of violating section 937, et seq., of this title, in causing two girls to be transported from one state to another for purposes of prostitution, which named date of trip, the girls involved, the mode of transportation, and object of transportation, using statutory terms, was sufficient, as against contention that indictment was too vague."

The Indictment in the instant case does not measure up to the standard of *U. S. vs. Hunt*, supra.

A perusal of each of the counts of the Indictment discloses that neither of them are sufficiently informative, specific, definite and certain as to satisfy constitutional requirements under the applicable portions of the 5th and 6th Amendments to the Constitution of the United States, there being an utter failure on the part of the

pleader to allege all of the essential facts such as the way, means or manner by which the alleged interstate transportation was accomplished or planned or contemplated, and there is also an utter failure on the part of the pleader to specifically allege whether or not said defendant *transported* or *caused to be transported in interstate commerce* or *aided and assisted in obtaining transportation* or *transporting* the women in question. The absolute failure to identify the particular offense attempted to be charged renders said Indictment a nullity. Any law or rule of law established by the Courts which authorizes, or pretends to authorize, an indictment such as was had in this case should be held to be unconstitutional, null and void for the reasons herein assigned.

We are familiar with the rule of law which has been applied in numerous cases, and that is,—that an indictment can follow the language of the statute and may contain a number of ways in which an offense could be committed, if the different ways are connected by the conjunctive "and" and not the disjunctive "or," but it is our contention that such a course of procedure can be followed legally, only when there is no inconsistency between any of the various ways it is alleged that the defendant employed to commit the offense. An indictment of murder could not charge in one count that the defendant shot, poisoned, choked, kicked, beat, speared, drowned and gassed the victim, thereby causing the victim to die and take pot luck on which would, upon the trial, fit the case from the standpoint of proof. Such pleading would never be proper for the reason that it would not be in the language of the statute and there would be a lack of directness. Such pleading would not only confuse a defendant, but would also confuse a jury if the case ever

went to the jury. The better reasoning suggests that every charge should be made with particularity, definiteness and directness and be such as to advise a defendant of the nature of the accusation. The charge in the instant case cannot be held to satisfy such requirements.

Section 557 of Title 18, heretofore referred to, states that "When there are several charges against any person for the same acts or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the Court may order them to be consolidated."

The use of the word "may" in connection with permitting a joining of several such counts in one indictment should be construed to be mandatory and not directory, because if the pleader had to get legislative authority to put these counts in one indictment, then certainly he has no statutory or other authority to lump a number of counts together, some of them inconsistent, in one all-embracing count.

In *Roark vs. U. S.* (C. C. A., Colo., 1927), 17 F. (2d) 570, 51 A. L. R. 870, it is stated:

> "Distinct violations growing out of same transaction are separate offense. Transporting woman and inducing her to be transported for immoral purpose, though single transaction, constitute separate offenses."

In a civil case no pleader would contend that he did not have to state and number his various causes of action

or be consistent in his allegations. He would not have the audacity to put all of his separate claims, both consistent and inconsistent, in one cause of action.

Certain decided cases, such as *Crain vs. U. S.*, 162 U. S. 625, 40 L. Ed. 1097; *Conners vs. U. S.*, 158 U. S. 408, 39 L. Ed. 1033, and *Bridgeman vs. U. S.*, 140 Fed. 577, have encouraged criminal pleaders to become incorrect and obscure. These three cases hold that it is not error to charge that a defendant did an act and caused it to be done, etc., but I do not believe that a close reading of any of these cases would convince this Court that an Indictment such as the one in this case should be legally approved. It is just about the "omega" of license in criminal pleading.

In the case of *United States vs. Morris Behrman*, 258 U. S. 280, it is said in paragraph 2 of the syllabus:

> "It is enough to sustain an indictment that the offense be described with sufficient clearness to show a violation of law, and to enable the accused to know the nature and cause of the accusation, and to plead the judgment, if one be rendered, in bar of a further prosecution for the same offense. If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent."

In the body of the opinion at pages 288 and 289 it is said:

> "It is enough to sustain an indictment that the offense be described with sufficient clearness to show a violation of law, and to enable the accused to know the nature and cause of the accusation, and to plead the judgment, if one be rendered, in bar of future prosecution for the same offense. If the offense be a

statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent. United States v. Smith, 2 Mason 143, Fed. Cas. No. 16,338; United States v. Miller, Fed. Cas. No. 15,775; United States v. Jacoby, 12 Blatchf. 491, Fed. Cas. No. 15,462; United States v. Ulrici, 3 Dill. 532, Fed. Cas. No. 16,594 (opinion by Miller, Circuit Justice); United States v. Bayard, 21 Blatchf. 287, 16 Fed. 376, 383, 384; United States v. Jackson, 25 Fed. 548, 550; United States v. Guthrie, 171 Fed. 528, 531; United States v. Balint, this day decided, 258 U. S. 250, ante, 604, 42 Sup. Ct. Rep. 301."

We submit that the indictment in the instant case does not measure up to these requirements.

Points II, III and IV.

It was the contention of the defendant at all times that the facts did not bring this case within the purview of the White Slave Traffic Act, and thus being violative of Sections 397 and 398 of Title 18, U. S. C. A., because it was intentional transportation from a point within Nebraska, to-wit, Grand Island, to the same point within Nebraska, and that the passing through other states was an incident only to the circle vacation tour and was not a transportation from one state to another (*U. S. vs. Wilson*, 266 Fed. 712). The defendant further contended that if the Government had alleged the true facts in the Indictment that the Indictment would not have charged a crime under Section 398 of Title 18, U. S. C. A., and therefore the defendant, in order to avoid the expense of a trial, offered to prove the true facts, which were known to the prosecution when the Indictment was prepared.

The Government, by its Demurrers, admitted the truth of the matters alleged in the offer to prove this Indict-

ment is a skillful circumvention of the law and an adroit evasion of the letter and spirit of the law.

The pertinent portions of the statute for the purpose of this inquiry are as follows:

> "397. WHITE-SLAVE TRAFFIC; TERMS DEFINED. The term 'interstate commerce,' as used in this section and sections 398 to 404 of this title, shall include transportation *from* any State or Territory or the District of Columbia *to* any other State or Territory or the District of Columbia."
>
> "398. TRANSPORTATION OF WOMAN OR GIRL FOR IMMORAL PURPOSES. * * * Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate commerce, * * *, any woman or girl for the purpose of prostitution or debauchery, * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the Court."'

This statute contemplates a starting point in one state, as is indicated, and a destination in another state, and does not contemplate that the starting point and the destination or ending of the transportation could both be in the State of Nebraska, the same state where the contemplated trip, according to the intention of the parties, was to have its beginning and its ending. If this sort of a situation was contemplated by Congress when the Act was passed, then the language of the statute would so indicate. The Court has no authority to read into this statute something which the lawmakers did not specifically put there. This is a criminal statute and as such, under the well-known and uniform holdings, it must be construed strictly.

The facts which the Government admitted by its Demurrers to the Plea in Abatement and Motion to Quash are as follows (R. 7-8):

> "That the appellants are husband and wife, and reside at Grand Island, Nebraska, and have been such residents for more than two years last past; that in August, 1940, appellants were contemplating a summer vacation circle trip from Grand Island through several western states, and to return to their home in Grand Island when they had finished their vacation and sightseeing; that Margaret Smith and Doris McMahon, alias Goldie Wright, named in the first and second counts of the indictment, were residents of Grand Island, Nebraska, and proposed to the defendants that they accompany defendants on the vacation trip to the mountains and pay their own expenses; that the defendants agreed to this arrangement, and the two girls named in the Indictment accompanied the defendants on the vacation circle trip and paid their own expenses; that on or about the 22nd day of August, 1940, the defendant and the two girls named in the Indictment left Grand Island, proceeding through Wyoming, Utah and Montana, and returning several days later by way of Colorado to Grand Island; that no immoral acts were committed by any of the parties on the trip and that the only intent and purpose was for a vacation, with no intent to violate Section 398 of Title 18, U. S. C. A., or any other Federal Statute, for the purpose of prostitution or debauchery, or with the intent or purpose to induce, entice and compel said girls to give themselves up to debauchery, or to engage in immoral practices, all of which was well known to the Government officials in charge of the prosecution at the time of the returning of the Indictment."

In *U. S. vs. Wilson*, 266 Fed. 712, opinion by Judge Sanforth, the defendant was indicted on a charge of violating the White Slave Traffic Act, tried, found guilty,

and judgment of imprisonment pronounced upon him. No question as to whether or not the law denounced the acts in question was raised before or at the trial; however, shortly thereafter the question having arisen in the mind of the Court, he requested briefs on the question involved.

The indictment and proof showed that the woman in question was transported in interstate commerce from Nashville, Tennessee, through the State of Tennessee and by way of Stevenson, Alabama, into Hamilton County, Tennessee, over the lines of Nashville, Chattanooga & S. S. Railroad Company.

The White Slave Traffic Act specifically provides that the words "interstate commerce," as used in the Act, shall "include transportation from one state * * * to another state." This definition necessarily excludes, by implication, transportation from one point in a state to another point in the same state. In interstate commerce, the words "from" and "to," as used in the Act, manifestly refer to two different states as the *respective points* of *origin* and *final destination* of the *transportation;* and not a state through which the woman is carried as a *mere incident* to the through transportation.

The proof showed a transportation from Nashville, Tennessee, to Chattanooga, Tennessee, with merely incidental passage through Alabama and not a transportation from Alabama to Tennessee, within the meaning of the Act.

> "*Held:* Indictment insufficient under true construction of Statute, and judgment set aside."

In *U. S. vs. Grace,* 73 Fed. (2d) 204:

The defendant was charged with transporting a young woman in interstate commerce from the Eastern District

of New York to Washington, D. C., for the purpose of prostitution and debauchery and other immoral purposes.

The evidence showed that the complainant came from Philadelphia to Brooklyn with her Bishop to give testimony at an ecclesiastical trial over which appellant presided. Later she rode back from Brooklyn to Philadelphia, through New Jersey, with appellant, his chauffeur driving, and that appellant attempted to have intercourse with her on floor of car going through New Jersey, but unsuccessfully. They remained in Philadelphia two weeks, during which time appellant took immoral liberties with her, but did not have intercourse with her. He then asked her to go to Baltimore, Maryland, with him, where they remained a short time, but appellant did not have sexual relations with her. Later they went to Washington, D. C., to appellant's home, where she did have sexual relations with him.

> "*Held:* That in order to constitute the offense charged, there must be substantial evidence that the intention to transport the woman for immoral purposes must have been formed by the parties before they reached the foreign state."

The statute makes the intent and purpose an element of the crime, and if the journey was planned with no immoral purposes at the time, no crime was committed, no matter what may have occurred thereafter. It is the immoral purpose which renders interstate commerce criminal. The immoral relationship, standing alone, unconnected with interstate commerce, does not violate the Act.

Inducing the girl to go from one state to another with any other purpose, except formed immoral intent at the outset, is insufficient to constitute a violation of the White Slave Law.

We have the simple situation of the trip being undertaken for legitimate purposes, and the immoral purpose, intent and relations arising after the transportation, so that the purpose and intent were not present before or during the transportation.

In *Sloan vs. U. S.*, 287 Fed. 91, it is stated:

> "that since the White Slave Traffic Act is valid only under the commerce classification of the National Constitution, Art. 1, Sect. 8, Clause 3, there must, in order to constitute the offense charged, be substantial evidence that the intention to transport the woman for immoral purposes was formed by the parties before they reached the foreign state to which she was transported, since the immoral act itself is exclusively within the jurisdiction of the police power of the state where it was committed."

The Court further held that the intent must arise before the transportation. This is a perfectly sound rule. In this case the defendant took the woman involved to St. Louis to visit her sister, and it was only after their arrival there that the matter of immoral relations arose. There is no question about the correctness of the Court's holding.

In *Drossos vs. U. S.*, 16 Fed. (2nd) 833, it is said:

> "No crime is committed unless the interstate transportation of the female was planned and made with immoral purpose."

The woman involved was threatened by her husband, who had stated that he would kill her if he found her at their home when he returned from work. Under this threat she left home with her small children and called on the defendant, a family friend. Defendant took her

to another state with the thought and intention that they would be married and live together there. There was no consideration of any illegal relations before or at the time the trip was made. After the trip was completed and the parties, who apparently were of foreign extraction, and not familiar with the laws of this country, learned that they could not be married because she already had a husband, so they began living together. Under these facts it was disclosed that the purpose and intent of immoral relations arose after the transportation had been completed, and not before the transportation, and it was held that the White Slave Act had no application to this state of facts.

In *Biggerstaff vs. U. S.* (C. C. A., 8th Circuit), 260 Fed. 926, it is stated:

> "A violation of the act requires that the transportation shall be for an immoral purpose and the mere commission of an immoral act by defendant while on the interstate journey with a woman for a lawful purpose does not, where the immorality was merely casual, constitute a violation of the act."

In *Alpert vs. U. S.* (C. C. A., N. Y.), 12 Fed. (2nd) 352, the Court said:

> "The journey from one state to another if followed by illicit intercourse does not result in violating the act where the journey was made for a wholly different reason."

In *Fisher vs. U. S.* (C. C. A., West Va., 1920), 266 Fed. 667, it is stated:

> "The transportation in interstate commerce must have for its object, or be the means of effecting or at least facilitating the sexual intercourse of the par-

ties. If the journey was for other reasons to which intercourse was not related the interstate transportation and eventual sexual intercourse cannot be regarded as a violation of the White Slave Act."

In the case of *Van Pelt vs: U. S.*, 240 Fed. 349, where a pregnant girl requested defendant to take her from Washington, D. C., to Baltimore, so that she might go into seclusion during her approaching confinement, and he did so, and made the arrangements and gave her more than enough money to pay the transportation and accompanied her to her destination, the Court, at page 349 of the opinion, said:

"There can be no doubt that the girl was brought to Baltimore in order that she *might* go into *seclusion*. The defendant may have *anticipated* that he would gratify his desire, as he doubtless would have done had the trip never *taken place*, but *there is no evidence that such anticipation played any part whatever in inducing him to arrange for her coming to Baltimore.*"

Again, on page 348 of the opinion, the Court said:

"Before he could be convicted the evidence *must show that he took* a hand in *procuring* the transportation for the *particular purpose charged* in the *indictment.*"

In *Shama vs. U. S.*, 94 Fed. (2d) page 1 (Certiorari denied 304 U. S. 568), it is held that an immoral purpose first conceived at the end of a journey is not sufficient under Section 398 of Title 18, U. S. C. A., to constitute a crime.

It is the inducement and transportation, not the subsequent conduct, which constitutes an offense under Section 398 of Title 18, U. S. C. A.

In *Coltabellotta vs. U. S.* (C. C. A., N. Y., 1930), 45 F. (2d) 117, it is stated:

> "To constitute a violation of this section there must exist a present intent to transport the female in interstate commerce for immoral purposes."

In *Hunter vs. U. S.* (C. C. A., Va., 1930), 45 F. (2d) 55, it is stated:

> "A conviction for a violation of this section requires a showing that the purpose in transporting the woman in interstate commerce was to have sexual intercourse with her."

In *Ghadiali vs. U. S.* (C. C. A., Or., 1927), 17 F. (2d) 236, certiorari denied (1927), 47 S. Ct. 660, 274 U. S. 747, 71 L. Ed. 1328, it is stated:

> "A secretary may be transported in interstate commerce without a violation of sections 397 to 404 of this title in the absence of a purpose to have sexual intercourse."

In *Yoder vs. U. S.* (C. C. A., Okla., 1935), 80 F. (2d) 665, it is stated:

> "Under the statute the prospect of sexual relations must have some relation to and be one of the reasons or purposes of the trip; but, if the sole purpose of the trip is legitimate, purely incidental intent to have intercourse is not a federal offense."

On November 4th, 1943, the Circuit Court of Appeals for the Eighth Circuit decided the case of *Ellis vs. United States*, which case appears in the Federal Reporter advance sheets of January 3, 1944 (138 Fed. (2d), p. 612), and same deals with the very question under discussion in the instant case and in principle that decision is in conflict with the decision in the instant case.

The first paragraph of the syllabus is as follows:

"Under statute forbidding transportation in interstate commerce of girl for immoral purposes, the gist of the offense is not ultimate immoral design but act of knowingly transporting or causing or aiding or assisting in transportation in interstate commerce of girl for such immoral design.—18 U. S. C. A. 398."

The second paragraph of the syllabus is as follows:

"Conduct of defendant, charged with having transported in interstate commerce girl for immoral purposes and with having conspired to commit such offense, is beyond Federal punishment, in absence of essential factor of interstate transportation in furtherance of immoral purposes.—Cr. Code 37, 18 U. S. C. A. 88; 18 U. S. C. A. 398."

In the opinion, at pages 613 and 614, it is stated:

"The question primarily before us in each appeal is whether there was sufficient competent evidence before the trial court to sustain a verdict of guilty (a) upon one or more of the first twenty-five counts, the sentences thereunder having been prescribed for concurrent service; and (b) upon the twenty-sixth count. This question involves certain issues touching the reception of testimony, and especially an examination of the evidence, which must be made with full understanding that the gist of the offense defined by 18 U. S. C. A. 398 is not the ultimate immoral design charged against the defendant, which, in its conception and achievement, is actually his major transgression, but rather the narrow act of the knowing transportation or causing, or aiding or assisting in the transportation in interstate commerce of any woman or girl with such immoral design. Hoke v. United States, 227 U. S. 308, 320, 33 S. Ct. 281, 57 L. Ed. 523, 23 L. R. A., N. S., 906, Ann. Cas. 1913E, 905; Athanasaw v. United States, 227 U. S. 326, 332, 33 S. Ct. 285, 57 L. Ed. 528, Ann. Cas. 1913E, 911;

Wilson v. United States, 232 U. S. 563, 571, 34 S. Ct. 347, 58 L. Ed. 728; Roark v. United States, 8 Cir., 17 F. 2d 570, 573; Drossos v. United States, 8 Cir., 16 F. 2d 833, 834; Tedesco v. United States, 9 Cir., 118 F. 2d 737, 741. So however immoral may be a defendant's conduct, it is beyond federal punishment in the absence of the essential factor of interstate transportation in furtherance of such conduct."

The following well chosen language taken from the minority opinion in this case by Circuit Judge Woodrough, perhaps analyzes more clearly and distinctly the true legal aspect better than the writers of this brief could do:

"Recognizing, as the record requires, that the business at appellants' house in Grand Island, Nebraska, was carrying on prostitution, I think there is a fallacy in spelling a crime out of the act of taking the inmates away from their place of prostitution and stopping it for the two weeks' period of vacation travel. In the Mann Act Congress has exercised its powers in the field of interstate commerce to prevent transportations in interstate commerce in furtherance of sexual immorality. I do not think its provisions contemplate, or can be extended to transportations that are not in furtherance and have nothing to do with sexual immorality except to interrupt and stop its practice for a period. The law has been on the books a long time and none of the cases cited appears to me to lend support to the affirmance. Wilson vs. United States, 266 F. 712, is to the contrary, so far as it is in point. But there the transportation may have been in furtherance of the immoral practices, and I do not rely on it. It seems obvious to me that aiding prostitutes to travel away from their foul environment for even a short vacation period is not evil conduct and that it is not the intent of the Act to make it criminal. Splitting the round trip into two transportations, innocent while outward bound but criminal on the homeward lap, seems to me a men-

tal operation that reflects ingenuity for the prosecutor rather than fair application of the Act to what the appellants did.

"I can discern only one intent of all the parties of the trip, and that was to take a vacation. They went away with that intent and held to it till they got back. The penitentiary sentences imposed upon these appellants for doing that and nothing more seem to me erroneous."

Point V.

If the view taken by Circuit Judge Woodrough, in the minority opinion, is correct, then the requested instruction refused by the Court, heretofore quoted verbatim, should have been given by the Court, because it covered correctly the defendants' theory of the case.

Point VI.

We feel that this Court should reconsider and reverse the ruling made at Kansas City, Missouri, on March 24, 1943, in which the Application of Appellants for leave of Court to have a Bill of Exceptions and to extend the time for serving, settling and filing same was denied (R. 53-78). At the time of this hearing a copy of the Transcript of the Evidence produced upon the jury trial and the Trial Court's instructions to the jury were not filed with the Court for it to consider, along with the application, affidavits and exhibits shown at pages 53 to 77 of the Record presented to this Court, but when the matter was passed upon at St. Louis, Missouri, and the majority opinion of the Circuit Court of Appeals was delivered in this case, same was read and considered by the Court (R. 81, Footnote 1). By not being permitted to have a Bill of Exceptions the appellants were prevented from urging and arguing certain of the Assignments of Error which they wished to urge.

It is our contention that these appellants should not have been penalized by not being allowed to have a Bill of Exceptions when both counsel for appellants and the Court were at fault—counsel in not getting an extension of time before 30 days had expired and the Court for not calling the meeting of counsel for the purpose of giving directions relating to the preparing of the Record in the case within 30 days.

Rule 7 of the Rules of Procedure in Criminal Cases states that:

> "The Clerk of the trial Court shall *immediately* notify the trial judge of the filing of the Notice of Appeal, and *thereupon* the trial judge *shall at once* direct the appellant or his attorney and the United States Attorney, to appear before him *and shall give such directions* as may be appropriate with respect to the preparation of the record on appeal, including direction for the purpose of making promptly available all necessary transcripts of testimony and proceedings."

The Clerk acted promptly in the premises.

This rule makes it mandatory for the Clerk to notify the Judge *immediately* and *thereupon* the Trial Judge *shall at once direct* counsel to appear and *shall* give such directions, etc. Does this rule contemplate that the Judge shall set the place of the meeting and hesitate to set the time without consulting appellants' counsel, and invite defense counsel to set a date best suited to his convenience, as the Judge's letter at pages 45 and 64 of the Record discloses?

Counsel for appellants then replied to the Judge's letter and, among other things, told the Court: "I would suggest that you set a date" (Tr. p. 47).

The Judge's Secretary then on February 1, 1943, advised counsel that the Trial Judge "is in the hospital with a bad cold but is expected to return to the office within a few days" (R. 47-48).

Appellants' counsel waited for a date to be set for the meeting and was lulled into security. No answer was given to his inquiry about the length of time he had in which to file his Bill of Exceptions (Tr. p. 47). He was cited to rules (Tr. pp. 47, 48). Then he received notice to appear on February 26, 1943, for the meeting under Rule 7, which was two days after the expiration of the 30-day period. Does this sound fair? Was this notice of the Judge's sent out at once as provided for by Rule 7? Were appellants entirely at fault? No other answers could be truthfully made to these inquiries except in the negative.

The first case decided upon the question presented under this point was *Wolpa vs. U. S.*, 84 Fed. (2d) 829. It was decided on July 20, 1936, by the Circuit Court of Appeals for the Eighth Circuit, but is not in point, as far as this case is concerned. The case of *Ray vs. U. S.*, 301 U. S. 162, was decided April 26, 1937.

The Court said in this case that "The rule presupposes that the Trial Judge, who is familiar with the proceedings on the trial, is in a position to estimate the length of time necessary for the preparing and the filing of the Bill of Exceptions and that the Judge is permitted, within 30 days after the taking of the appeal, to fix the time for the serving, settling and filing of same."

Rule 4 of the Rules of Criminal Procedure provides:

"RULE 4. CONTROL OF APPELLATE COURT.

"The Clerk of the trial court shall immediately forward the duplicate notice of appeal to the Clerk of the Appellate Court, together with a statement from the docket entries in the case substantially as provided in the form hereto annexed.

"From the time of the filing with its Clerk of the duplicate notice of appeal, the Appellate Court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal.

"The Appellate Court may at any time, upon five (5) days' notice, entertain a motion to dismiss the appeal, or for directions to the trial court, or to vacate or modify any order made by the trial court or by any judge in relation to the prosecution of the appeal, including any order for the granting of bail."

The rule specifically gave the Circuit Court of Appeals full authority to set aside or modify the Trial Judge's order *whenever it appears* that there has been an abuse of discretion or *that the interest of justice require it.*

The rule provides for the correction of any miscarriage of justice in this respect.

Did the Trial Judge ever, within 30 days, fix the time for the serving, settling and filing of the Bill of Exceptions in this case? Certainly he did not do so, and that fact is unmistakably and clearly shown by the record. What the Trial Judge really did was done 28 days after the filing of the Notice of Appeal. He directed counsel to appear in Chambers, at Omaha, Nebraska, within the 30-day period and in doing so he fixed the date of the meeting of counsel 2 days after the 30-day period had expired, and consequently this procedure resulted in the appellants being denied their rights to have a Bill of Ex-

ceptions in this case. Certainly that cannot be regarded as a reasonably fair compliance with Rule 7 because the Trial Court was required under Rule 7 to set the date of his meeting with counsel "at once" after being advised of the Appeal by the Clerk.

In *Boynken vs. Huff*, 121 Fed. (2d) 865, the Trial Judge settled the Bill of Exceptions at a time beyond the time allowed and a Motion to Strike the Bill of Exceptions was denied by the Circuit Court of Appeals.

The Court further stated that the letters in this case between the defendant and the Trial Judge are set out. The defendant had no counsel on appeal. Judge Rudlige said on page 873: "*The initiative* in matters relating to preparations of the record is on the trial judge or clerk of the trial court." Under Rule 7 it is made the duty of the Judge to *act at once* and *direct* appellant or his attorney and the United States Attorney to appear before him and give instructions. This was not done in this case. The only rule which specifies a particular time limit is that part of Rule 9 which sets the time to be 30 days after the appeal. *But neither this nor any other requirement subsequent to taking the appeal can be regarded as jurisdictional* in the light of *Forte vs. U. S.* (1937), 302 U. S. 223, where the Court said: "*from the time of taking the appeal the court of appeal has complete supervision and control of the proceedings on the appeal including proceedings relating to the preparation of the record, * * * to vacate and modify any order made by the trial judge concerning prosecution of the appeal including the fixing of the time for settlement and filing of the Bill of Exceptions.*" This case cites and follows *Ray vs. U. S.*, 301 U. S. 158. The Court refused to strike the Bill of Exceptions settled out of time. No extension for settlement of the Bill of Exceptions had been given.

CONCLUSION

We submit that for the reasons stated herein, and each of them, that the Judgment of the lower Court should be reversed.

Respectfully submitted,

EUGENE D. O'SULLIVAN,
of Omaha, Nebraska,
THOMAS W. LANIGAN and
WILLIAM P. MULLEN,
of Grand Island, Nebraska,
Attorneys for Petitioners.